IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.927 OF 2004

Ramu Dhanbahadur Thapa,
Age: 27 years, Occ: Labour,
Residing at Kunegaon,
Taluka Mawal, District Pune,
(at present detained in Yerawada
Central Prison, Pune 411 006.) ..Appellant.
(org. Accused No.8)

V/s.

1. The State of Maharashtra
(Through Officer in charge,
Vadgaodn Maval Police Station,
Pune.) ..Respondent.

WITH

CRIMINAL APPEAL NO.845 OF 2004

1. Santosh Anthony Waghmare,
   Age: 19 years, Occ.Labour,

2. Kumar Kundlik Pawar,
   Age:22 years, Occ.Labour,

3. Prakash Gopal Jadhav,
   Age: 29 years, Occ.Labour,

4. Sobio Saiman Waghmare,
   Age: 19 years, Occ:Labour,

5. Laxman Subhash Waghmare,
   Age: 29 years, Occ.Labour,

6. Gulab Yakub Jadhav,
   Age: 25 years, Occ.Labour,

7. Kalu Arun Tambe,
   Age: 21 years, Occ.Labour,

8. Kalu Anthony Jadhav,
   Age: 22 years, Occ.Labour,

9. Laxman Fransis Waghmare,
   Age: 30 years, Occ.Labour,

10.Markos Sakharam Waghmare,
Age: 25 years, Occ.Labour,
11.Suresh Lahanu Waghmare,
Age: 33 years, Occ.Labour,

12.Sunil Baban Waghmare,
Age: 20 years, Occ.Labour,
All residing at Kunegaon,
Taluka Mawal, District-Pune. ..Appellants.
(at present detained in Yerawada
Central Prison, Pune 411 006.)

V/s.

State of Maharashtra,
(Through Officer-in-charge,
Vadgaon Maval Police Station, Pune) ..Respondent.

Mr.A.V.Dhavale for appellant/original accused No.8 in Appeal No.927/2004.

Smt.Pranali Kakade for appellants in Appeal No.845/2004.

Mr.K.V.Saste, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : NOVEMBER 30, 2006.

ORAL ORDER :

1. These two appeals can be disposed of by a common judgment, as the same take exception to the self-same judgment and Order passed by the 10th Additional Sessions Judge, Pune dated 10th May, 2004 in Sessions Case No.120 of 2003. Criminal Appeal No.927 of 2004 is filed by Accused No.8, whereas Criminal Appeal No.845 of 2004 is filed by accused Nos. 1 to 7, 9 to 13. All the accused/appellants have been convicted for offence punishable under

section 395 of I.P.Code and sentenced to suffer R.I. for a period of 5(five) years and to pay fine of Rs.1,000/-each in default R.I. for a period of three months.

2. Briefly stated, the prosecution case is that on the fateful night, the complainant Anil Babanrao Rajguru(P.W.1) was employed as driver in the company where Dr.Sumantran was the Executive Director. On 3rd October, 2002 at about 6 a.m. the complainant and Dr.V.Sumantran left for Mumbai by car from Pune. On 4th October, 2002 after the official meeting of Dr.V. Sumantran concluded, they left for Pune from Worli, Mumbai by road at about 6.45 p.m.. It is the prosecution case that car had reached at the spot where the incident is alleged to have taken place at around 9.30 p.m. The spot is located on the express highway. According to the prosecution, the car first jumped on the stones which were kept on the road and then front tire got punctured. Dr.Sumantran advised the driver(P.W.1) to park the car at the road side. After the car was parked, P.W.1 got down from the car to replace the damaged tire. While he was in the process of removing the said tire, he saw about 6 to 7 persons coming out of bushes from the road side with weapons like swords. One of them was wearing

baniyan and half pant, having sword in his hand. He assaulted P.W.1- Anil Rajguru causing injury near his left eye. According to the P.W.1, he immediately caught hold of the miscreant and both of them fell down on the road. Somehow P.W.1 rescued himself and came near the car. He asked Dr.Sumantran to lock the car from inside. He also asked Dr.Sumantran to handover pistol to return the attack of the miscreants. On hearing that, miscreants who had collected, started pelting stones on the car, which in turn damaged the car. According to the P.W.1, he then told Dr.Sumantran to get down from the car and run away from the spot. Dr.Sumantran accordingly, came out of the car and took lift from one truck which was proceeding towards Pune. P.W.1 thereafter, ran towards Pune side while he was being chased by the miscreants. He spotted one Tata Sumo Jeep going towards Pune and halted that sumo jeep which dropped him near toll naka(Octroi Naka), where P.W.1 was given first aid in the ambulance standing near the toll naka. Later on P.W.1 informed the police station. On receiving such intimation P.W.4-Vijaykumar Dattaram Bhoite, I.O. reached at toll Naka, where the statement of P.W.1 came to be recorded. By that time, P.W.1 had learnt that the miscreants after damaging the car had taken away one

palm top computer, one Nokia mobile belonging to Dr.Sumantran, one small tape recorder of Soni make, Bags of complainant and of Dr.Sumantran. That fact has been noted in the complaint, in his statement which is registered as FIR bearing C.R.No.146 of 2002. After registering the offence, investigation commenced. The accused came to be arrested in connection with the present offence on 22nd November, 2002. The accused were in custody of Lonavala Police Station in connection with some other offence. Their custody was transferred to Wadgaon Mawal police station, where P.W.4 was attached and was investigating the case, which had occurred within his jurisdiction. During the course of investigation, on 5th October, 2002, at about 7 a.m., spot panchanama came to be prepared. Spot panchanama gives description of stones as well as broken glasses of the car. Car was not on the spot at the relevant time. No separate panchanama regarding damage caused to the car by the miscreants has been recorded. Be that as it may, the evidence of the Investigating Officer(P.W.4) indicates that he sent requisition to the Tahasildar on 1st January, 2003 for conducting test identification parade of the accused persons. Pursuant to the said requisition, test identification parade was held by the Tahasildar on 11th February,

2003 in Tahsil Office. Test identification parade was held in three rounds. Accused Nos. 3, 13, 6 and 4 were produced in the first round; whereas Accused No.1, 10, 9, 12 were produced in the second round; and Accused Nos. 7, 2, 11, 8 and 5 were produced in the third round. Interestingly, the dummies were common in all the three rounds, which fact can be culled out from the evidence given by the prosecution witnesses. Chargesheet came to be filed on 17th February, 2003 immediately after the identification parade was held. The trial proceeded before the Sessions Court, who in turn framed charge. Accused persons pleaded not guilty to the charge and claimed to be tried. The prosecution examined P.W.1, who is witness to the incident and complainant. No other eye witness has been examined by the prosecution, including Dr.Sumantran. Besides, prosecution has examined Tahasildar(P.W.2) and the panch witness regarding spot panchanama Exh. 34 as P.W.3. In addition, the prosecution examined Investigating Officer P.W.4. On the basis of this evidence, the trial Court proceeded to record finding of guilt against the appellants for offence punishable under section 395 of I.P.Code.

3. The trial Court essentially found that the

testimony of prosecution witnesses has been corroborated. It is further found that the testimony of the prosecution witness remained unshaken. There was no enmity with the accused to involve them falsely in the crime. In the circumstances, the trial Court has noted that the evidence on record was trustworthy, therefore, believed the testimony of witnesses. The trial Court has also noted that even though there was no recovery in this case, however, from the testimony of the complainant and the prosecution witnesses, it was apparent that more than five persons attacked the complainant with deadly weapons. Moreover, assailants have been identified by the prosecution witness, in particular P.W.1, during the test identification parade as well as in Court. Essentially on this reasoning, the trial Court proceeded to record finding of guilt against the appellants. This decision is the subject matter of challenge in the present appeal.

4. Having considered the rival submissions and going through the materials on record, I have no hesitation in taking the view that the trial Court has committed manifest error in recording finding of guilt against the appellant in the fact situation of the present case. I shall presently assign the

reasons for taking this view.

5. In the first place, after the incident, P.W.1 claims to have escaped from the spot and reached at the toll naka from where he reported the matter to the police. The Investigating Officer reached at the toll naka and recorded the statement of P.W.1. In that statement, the witness has not given description of any of the assailants except mentioning that the person who was in baniyan and half pant had given first blow to him near his left eye. No other description has been given by this witness. The Investigating Officer in his evidence has not indicated as to on what basis he suspected the involvement of the present appellants in the commission of this offence. That evidence is totally absent. Assuming that the version of P.W.4 in the cross-examination that he had shown photographs of all the accused to P.W.1 and Dr. Sumantran was to be accepted-as having been done before arresting the accused, however, it is not clear as to when the said photographs were shown to the complainant(P.W.1). Assuming that it was shown before 22nd November, 2002, when the accused came to be arrested in connection with the present offence, the fact remains that the incident had happened on the night of 4th

October, 2002. P.W.1 in his evidence has accepted that it was dark near the spot at the relevant time. No where in the examination in chief P.W.1 has asserted that he was in a position to see the assailants properly or that could notice their identification marks so as to identify at such distance of time on the basis of photographs alone. In other words, there is no satisfactory evidence as to what persuaded the Investigating Officer to proceed against the present accused in connection with this offence. Besides, what is intriguing is that the prosecution has not examined Dr.Sumantran who was accompanying P.W.1 in the same car. No explanation has been offered by the Investigating Officer(P.W.4) in this behalf, nor by the complainant(P.W.1). In other words, the version of P.W.1 has not been corroborated, though the prosecution could have examined other independent witness who was available on the spot and was himself a victim. As this link has reamined unexplained it creates doubt. For that reason it will be unsafe to proceed against the accused on the basis of the testimony of the sole eye witness P.W.1. Interestingly, the investigating officer has not taken the trouble of immediately sending the complainant(P.W.1) for medical check-up and obtain

medical certificate regarding the nature of injuries caused to him. In that sense, injury of P.W.1 has not been proved by the prosecution. No medical officer has been examined. Similarly, Investigating Officer has not prepared any seizure panchanama of the articles, which were found on the spot or any other recovery reported from the accused. Having regard to such infirmities, it is unsafe to proceed against the accused on the basis of evidence of P.W.1 alone.

6. Indeed, the prosecution has relied on the test identification parade conducted on 11th February, 2003, wherein complainant(P.W.1) has identified all the accused. Even the test identification parade as conducted is of no avail to the prosecution. The Tahasildar(P.W.2), who conducted the test identification parade, has obviously not complied with the basic requirements of holding a fair and proper test identification parade. In the first place, prosecution has not explained as to how the accused were produced for test identification parade when they were in custody. The evidence of P.W.2 would indicate that the accused were kept in police locker, which is within the same campus where the Tahsil office is situated. The

accused persons were brought in open from the police lock up to the Tahasil Office. There was ample opportunity to the complainant(P.W.1) to see the accused persons while they were being taken away to Tahsil office. The Tahasildar(P.W.2) has not made basic enquiry from the witness as to whether he had opportunity to see the accused before the test identification parade was held. Moreover, it cannot be overlooked that the incident had taken place on the night of 4th October, 2002, whereas the test identification parade was held on 11th February, 2003. There is nothing on record as to what prevented the investigating officer to send requisition for conducting test identification parade till 1st January, 2003 even though the accused persons were in his custody from 22nd November, 2002. The Investigating Officer has no where stated in his evidence that he had ensured that during this period, the witness would get no opportunity to see the accused persons. The delay in conducting the test identification parade has not been explained at all by the Investigating Officer. Besides, it has come in the evidence that test identification parade of all the accused was conducted on the same day in three rounds. The dummies for all the three rounds were common and not replaced. This obviously gave

enough opportunity to the witness to identify the accused in atleast in the second and third round as the dummies of the first round were the same in the following rounds. Even for this reason, the test identification parade will be of no avail to the prosecution.

7. The learned APP made fervent attempt to contend that atleast test identification parade of accused No.3, 13, 6 and 4, which was held in the first round should be accepted. As mentioned earlier, there is fatal infirmity of not ensuring that the witness had no opportunity to see the accused persons before the test identification parade was conducted. In fact, in the evidence of the Investigating Officer during the cross-examination, he has admitted that he had photographs of accused persons, which were shown to the complainant(P.W.1) and Dr.Sumantran. Taking all these facts into consideration, even the test identification parade will be of no avail.

8. To get over this position, the learned APP would contend that the accused persons have been identified in court. That identification parade cannot be ignored. It is argued that, keeping in

mind the identification parade of the accused in court; and the version of the prosecution witness, no fault can be found with the finding of guilt recorded by the trial Court. I am not in agreement with this submission. The fact that the accused persons have been identified by the witness in court is of no avail to the prosecution. The complainant(P.W.1) had no opportunity to properly identify the accused persons during the incident. Merely because the witness asserts in court that the persons standing in the Court are the same accused persons cannot be the basis to proceed against the accused persons. In my opinion, the investigation of the case is replete with drawbacks. To wit, there was no material before the Investigating Officer to assume that the appellants were involved in the present offence. The investigating officer has not explained as to what prompted him to suspect involvement of the accused in the commission of this offence. Taking over all view of the matter, I have no hesitation in overturning the finding of guilt recorded by the trial Court against each of the accused and instead acquit them of the alleged offence. Hence these appeals ought to succeed.

9. Both the appeals are allowed. The impugned

Judgment and order passed by the trial Court is set aside and instead the appellants are acquitted of the alleged offence. The appellants be set at liberty and released forthwith, unless required in connection with some other offence.

10. Muddemal property be disposed of in accordance with the law.